

Національний університет «Одеська юридична академія»

Робоча група з питань розвитку кримінального права
Комісії по правовій реформі при Президентові України

Робоча група з питань кримінального та кримінального процесуального права
Науково-консультативної ради при Голові Верховної ради України

Південний регіональний центр Національної академії правових наук України
Кафедра кримінального права НУ «ОЮА»

Одеський місцевий осередок ГО «Всеукраїнська асоціація кримінального права»

Завдання кримінального права в умовах надзвичайного стану

Матеріали Міжнародної науково-практичної конференції,

*присвяченої 25-річчю утворення
Національного університету
«Одеська юридична академія»*



**м. Одеса
9 грудня 2022 р.**

«Завдання кримінального права в умовах надзвичайного стану». Матеріали міжнародної науково-практичної конференції, присвяченої 25-річчю утворення Національного університету «Одеська юридична академія». Одеса, 9 грудня 2022 року. Укладачі: Є.Л. Стрельцов, В.П. Кедик. Відп. редактор Є.Л. Стрельцов. Одеса: ПРЦ НАПрН України, НУ «ОЮА», 09.12.2022. – 214 с.

У збірнику представлені тези доповідей та повідомлень, які були оприлюднені на міжнародній науково-практичній конференції «Завдання кримінального права в умовах надзвичайного стану», присвяченій 25-річчю утворення Національного університету «Одеська юридична академія», яка відбулась 9 грудня 2022 року на базі Південного регіонального центру Національної академії правових наук України та кафедри кримінального права Національного університету «Одеська юридична академія». Збірник розрахований на науково-педагогічних працівників, докторантів та аспірантів, магістрантів та студентів, практичних працівників, всіх, кого цікавлять сучасні проблеми кримінального права.

Відповідальний за випуск:
д.ю.н., професор Є.Л. Стрельцов

Тези друкуються в авторській редакції. Відповідальність за зміст поданого матеріалу несуть автори.

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Kuzmin E. E.

Candidate of Science of Law, Associate Professor at the Department of Criminal Law National University "Odesa Law Academy"

CHANGING CRIMINAL LEGISLATION DURING A STATE OF EMERGENCY

... is it actually a good idea?

The quick and simple answer would naturally be: "... it all depends ...", but why is that so and what lies "beyond" it? If yes, then how? If no, then why?

Most of the time, it all starts with the general "background" information about the total number of modifications, which have been made to the original text of the current Criminal Code of Ukraine (hereinafter – the Code), since the moment of the adoption of its very first version on April 5, 2001 [9]. Hence, throughout the existence of over 21 years till now, the initial document has undergone 219 revisions, 248 amendments on the basis of the Laws' Decisions of the Constitutional Court and Air Code of Ukraine^[12]. In fact, this figure is only displaying the numeric value of the "grounds for introduction" of the developments mentioned above. However, in reality, their overall quantity is far higher, as they are "manifesting themselves" across the whole Code, "affecting" a considerable part of its provisions (for more details, see: [3]).

As of today, it appears that all of these additions and clarifications were made in a variety of fundamentally different situations, both in times of peace and in cases of emergency (including, but not limited to "emergency situation", anti-terrorist operation, times of protests, situations of armed conflicts, in the middle of a pandemic and during the armed aggression). Thus, the traditional question that arises in this context is whether and to what extent all of this kind of changes could be deemed as necessary, appropriate, well-timed and effective enough to meet all of the expectations, associated with their implementation. This, in turn, leads to the quality-related issues of a piece of legislative design of such novelties.

Even a "surface analysis" of the relevant adjustments suggests that, perhaps, a "classic approach", which is used by default in a peacetime might not be fully functional when it comes to introducing changes during the extraordinary periods. So, does this mean that in order to avoid inaccuracies and inconsistencies, the corresponding process has to be put "on pause" till the dust settles? Is it a certain sign or symbol of stability of criminal legislation? Apparently, it is at first glance. But how then to be with the premise that criminal legislation is needed to evolve in relation to development, progress and social change? Even more, to adapt itself to the needs and conditions of the time?

A possible counterargument is that there is a number of shortcomings still remain when it comes to adopting amendments to the Code in normal times. One can only imagine how the scenario will be worsened given the circumstances of the ongoing emergencies. Indeed, there is no need to conceive it. Such complications are quite well visible in the case of the enactment of the latest draft laws, "amending the law on amendments" (see, for instance: [7; 6]). Is it a feature of evolution? More likely than not. And yet again, at the same time, the foregoing illustrates the existence of substantial grounds for believing that all of such decisions of the legislator must be carefully considered beforehand. And if in terms of the process of the "shift of changes" itself the fewer questions arise, some of their implications have continued to be a matter of deep concern.

Furthermore, the situation is complicated by the fact that when such measures are taken in order to fulfil international obligations or implement advanced foreign experience.

Probably, one of the most striking examples of this, nowadays, is a "mixture" of issues linked to the processes of European integration. Especially, when it involves approximation and harmonisation perspectives. Guided by the idea of the necessity to bring the domestic law in line

with international standards and the European Union legislation, two major trends have been shaped recently. The first conventional direction is dedicated to the development of absolutely new criminal-legal norms that have never before been reflected in the text of the Code, whereas the second one is focused primarily on making edits to its existing provisions. And already traditionally, each of them is “burdened” by the presence of multiple fairly complex problems.

So, under the pretence of “compliance with the international treaties and their execution”, along with “adaptation of national legislation to *acquis communautaire*”, and accompanied by the reservation of “experience of the developed countries”, the text of the existing Code is currently “enduring a dramatic mutation”. Although well-intentioned, choosing the right and better path forward, it often leads to a significant number of the daunting complexities, both theoretical and practical. The incoherence between the incorporated changes and already existing provisions of the Code, as well as their duplication and overlap, its contradiction to unbreakable foundation (axioms and postulates) of national criminal law resulting in not only confusing perception, but also genuine difficulties in realizing them in practice. All this creates the impression of sharply articulated local and fragmented character, their largely unsystematic, “piecemeal” or even “chaotic” nature, which entails a lot of complications, including appropriate criminal-legal assessment of these or those acts as criminal offences.

But not even this is made such a situation surprising. What puzzles the most is the number, frequency and ease of such changes made. So, in a strive for the “... acceptance of all EU legislation ...” [2], why the underlying context is not being accepted? Now, it seems that several important considerations are lost sight of.

First, and foremost, this is utterly [4, p. 49] sensitive area [11, p. 148] that requires careful and reverential attitude. It is expressed both in terms of “harmonisation” and “substantive criminal law” separately, and together, as it is believed that they are closely tied to the state sovereignty [4, p. 49] on the one hand, and national cultural, social and historical roots [10, p. 116], on the other. Therefore, any intervention in the national criminal law systems must be very cautious, demanding respect for their “legal systems and traditions” [11, p. 146].

Secondly, the presumption of an extremely diligent approach to the “harmonization”, which is reflecting, *inter alia*, in the use of a lukewarm “approximation” terminology [4, p. 52] instead, its “functional understanding”, “limits”, (“emergency brake” and “cautious”), “selective” [11, pp. 144-146, 148] and “minimum” [8, pp. 170-171] character. Consequently, it is perceived as approximation of aspects of the different criminal law systems, but not as the complete replacement of national criminal law systems by a single, uniform one [8, pp. 170-171].

And finally, thirdly, it is also forgotten that there were a couple of hardly successful attempts of “harmonization” within the European Union before, including the case of criminal sanctions, that has proven little effective so far [10, p. 115], as well as the concepts belonging to the “General Part” of Penal Codes, which also inevitably led to tension [1, p. 266] and the creation of a European criminal law code, that considered as a complex and, to a certain extent unpopular issue [4, p. 49].

As a result, all this suggests that “repressive orientation” [8, p. 178] and “highly positivistic approach [5, p. 65] of similar processes are not that appropriate, as they would be treated rather as an acceptance of completely “external” standards and an embark on a “journey into the unknown” [8, p. 178]. In contrast, it is thought to be a “two-way street” [5, p. 66], both influencing and being influenced by each other [5, p. 46].

Eventually, it should be pointed out that such logic is now seems to be absolutely fair with regard to any changes made to the current criminal legislation. And it does not matter for what reason they are made, and under which conditions. In any case, they must be thoroughly thoughtful, substantively verified and properly designed, bearing in mind that changing laws is also changing the lives and the price of a mistake is the fate of a human being when dealing with “criminal”. As for the “international” and “foreign”, the cornerstone is the “effectiveness and

quality of implementation” [1, p. 266], that has been remaining a cause for further thinking and deliberation.

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